STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and The Circuit Court for the County of Montcalm)

CYNTHIA HARDY, Personal Representative
For the Estate of MARGARET MARIE ROUSH,

Plaintiff-Appellee,

-vs-

LAURELS OF CARSON CITY, LLC,

Defendant-Appellant.

Supreme Court No: 150882
COA Case No. 317406
L.C. Case No. 2012-K-16830-CZ

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-APPELLANT THE LAURELS OF CARSON CITY, LLC

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ORIGINAL STATEMENT OF THE QUESTIONS PRESENTED

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Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

The trial court said "Yes."

The Court of Appeals said "No."

II. DID THE COURT OF APPEALS ERRONEOUSLY ACT *SUA SPONTE* TO REINSTATE THE REMAINING TORT CLAIMS WHICH HAD BEEN ABANDONED BY PLAINTIFF?

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

The Court of Appeals said "No."

INTRODUCTION

This supplemental brief is responsive to the following dictates contained in the Supreme Court's order of September 18, 2015 in response to Defendant's Application for Leave to Appeal:

> On order of the Court, the application for leave to appeal the December 11, 2014 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in reversing the Montcalm Circuit Court's grant of summary disposition to the defendant pursuant to MCR 2.116(C)(10) of the plaintiff's false imprisonment claim based on its conclusion that genuine issues of material fact remained whether Margaret Roush's patient advocate designation became effective on October 24, 2012, see MCL 700.5506, and whether Roush subsequently revoked her patient advocate designation, see MCL 700.5510(1)(d); (2) whether the Court of Appeals erred in relying on an affidavit submitted by the plaintiff's attorney pursuant to MCR 2.116(H) to conclude that genuine issues of material fact remained; and (3) whether the Court of Appeals erred in addressing the plaintiff's remaining claims of intentional infliction of emotional distress, abuse of process, and civil conspiracy, where the plaintiff did not challenge that portion of the trial court's order granting summary disposition as to those claims.
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> Order, 9-18-15, attached hereto as EXHIBIT A.

SUPPLEMENTAL ARGUMENT I

THE TRIAL COURT PROPERLY GRANTED DEFENDANT-APPELLANT THE LAURELS OF CARSON CITY, LLC'S MOTION FOR SUMMARY DISPOSITION DUE TO THE ABSENCE OF TRIABLE ISSUES OF FACT REGARDING WHETHER THE PATIENT ADVOCATE DESIGNATION WAS PROPERLY CREATED AND REMAINED IN EFFECT DURING ALL SUBSEQUENT, RELEVANT TIMES

It is well settled that the essence of a claim of false imprisonment is that the imprisonment is false, *i.e.,* without right or authority to do so. *Donovan* v *Guy* (1956), 347 Mich 457, 464; *Barker* v *Anderson* (1890), 81 Mich 508, 511; *Carr* v *National Discount Corporation* (CA 6, 1949), 172 F2d 899, *cert den* 338 U.S. 817 (70 S Ct 59, 94 L Ed 495, *Leisure* v *Hicks* (1953), 336 Mich 148. False imprisonment occurs where an actor intentionally, and without privilege or other legal authority, causes another to be confined, such that the other person is aware of his or her confinement. *Moore v Detroit*, 252 Mich App 384, 387-388; 652 NW2d 688 (2002) *Hess v Wolverine Lake,* 32 Mich App 601, 604; 189 NW2d 42 (1971).

A. Creation of the Patient Advocate's Powers

As elaborated upon in Defendant's current Application, the Patient Advocate' powers were properly invoked on October 24, 2012, after the attending physician and a second physician documented Ms. Roush's inability to contribute to medical decision-making. Once the designation is accepted, the patient advocate gains the authority to act when the individual becomes "unable to participate in medical treatment… decisions. MCL 700.5508(1). By statutory dictate, this determination is made by the individual's attending physician and another physician or psychologist. MCL 700.5508(1). They must put their determination in writing,

which is then to be made part of the resident's medical record. *Id.* The determination must be reviewed at least once a year. *Id.*

If a durable power of attorney for health care is properly signed and witnessed, if a proper determination has been made by the two designated physicians that the resident is unable to participate in medical treatment decisions, if the patient advocate is acting in the resident's best interest, and if the directions of the patient advocate are within sound medical practice, a nursing home is obligated to follow those directions. MCL 700.5511(3). ["A person providing care, custody, or medical or mental health treatment is bound by…a patient's advocate instructions if the patient advocate complies with sections 5506 to 5515..."].

The Court of Appeals ignored these clear statutory mandates by holding [and Plaintiff has erroneously reargued] that these issues could be relitigated after the fact in a false imprisonment lawsuit. The statutory directives above are mandatory and unambiguous: as a matter of law, when the two physicians make the required written declaration, the patient advocate's powers are invoked as a matter of law and, at that point, the facility has a statutory obligation to comply with the Patient Advocate's decisions that are made for the best medical interests of the patient. See MCL 700.5511(3), supra. Plaintiff had the option to contest the two physicians' determination by filing a petition under MCL 700.5508(2). However, she failed to do so and this subsequent litigation may not be used as a substitute for that authorized procedure to receive the now desired judicial determination.

B. <u>Attempts to Revoke the Appointment</u>

In responding to the current Application, Plaintiff asserts that the presentment by Plaintiff's counsel of the purported written revocation of the appointment was absolute and Defendant's efforts to utilize authorized judicial procedures to verify the validity of the

revocation do not shield it from false imprisonment liability. Plaintiff's assertion (and the Court of Appeals' position below) is legally erroneous.

The statutory scheme and Michigan Court Rules contemplate protective judicial procedures to resolve parties' concerns over issues such as whether the patient regains the ability to make his or her own medical decision or whether there is a valid intent to revoke a patient advocate designation.

Those judicial procedures are detailed in Defendant's current Application. Succinctly, the following disputes can be resolved through petition to the probate court: (1) Whether or not an individual is able to participate in medical treatment decisions. MCL 700.5508(2); (2) **Whether or not an individual has revoked a durable power of attorney for health care. MCL 700.5510(1)(d);** and (3) Whether or not the patient advocate is acting in accord with the individual's wishes and otherwise consistent with the individual's best interests. MCL 700.5511(5). In the context of determining the validity of a patient's confinement, a petition for writ of habeas corpus may also be filed in the county circuit court. MCR 3.302.

MCL 700.5510(1)(d) states in this particular regard:

> (1) A patient advocate designation is revoked by 1 or more of the following:
>
> ***
>
> (d) The patient's revocation of the patient advocate designation. Subject to section 5515, even if the patient is unable to participate in medical treatment decisions, a patient may revoke a patient advocate designation at any time and in any manner by which he or she is able to communicate an intent to revoke the patient advocate designation**. If there is a dispute as to the intent of the patient to revoke the patient advocate designation, the court may make a determination on the patient's intent to revoke the patient advocate designation…**
>
> MCL 700.5510(1)(d) [emphasis added].

The legislature thus contemplated that there would be uncertainties and disputes inherent in the procedure for creating and revoking a patient advocate designation**. The legislature also contemplated that disputes concerning*, inter alia*, one's "intent" to revoke a patient advocate designation be resolved judicially at the time of the uncertainty and not second guessed in subsequent civil litigation! Also, notably absent from the statutes is any requirement that a facility or medical provider honor a claimed revocation of the designation prior to resolution of invoked judicial procedures.**

Specifically**,** it is well settled that courts may not read into a statute a requirement that the Legislature has seen fit to omit. *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951). When the Legislature fails to address a concern in the statute with a specific provision, the courts "cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142; 662 NW2d 758 (2003).

In light of these legal considerations, the following facts must be re-emphasized.

On November 15, 2012 Defendant met with Plaintiff's attorney, Scott Millard, at Defendant's facility who demanded the release of Ms. Roush and presented a written revocation of the patient advocate designation along with a purported appointment of grandaughter Cynthia Hardy as Ms. Roush's successor Patient Advocate. However, Defendant's staff had reason to question the Ms. Hardy's actual intent to revoke the original appointment given the possibility of undue influence, as well as the invalidity of Ms. Hardy's purported appointment as the successor Patient Advocate because (i) there was a genuine dispute as to whether Ms. Roush had the requisite mental capacity and intent required by MCL

§ 700.5506(1) to designate a new patient advocate and (ii) the designation did not contain the requisite two witness signatures [as required by MCL § 700.5506(4)].

Given the inherent uncertainty as to who had authority to make medical decisions on behalf of Ms. Roush, Defendant advised Plaintiff's attorney that the probate court should be petitioned for judicial guidance. Later that same day, on November 15, 2012, Plaintiff's attorney filed a petition for a writ of habeas corpus pursuant to MCR 3.303 the Montcalm County Circuit Court, requesting a determination of the propriety of Ms. Roush's continued confinement at the home. Defendant's answer to the writ of habeas corpus concluded with the following request for judicial guidance:

> WHEREFORE, Respondent seeks direction from the Court. Respectfully, this matter seems to be a matter covered under the Estates and Protected Individuals Code, MCL § 700.1101, et. seq., and therefore within the jurisdiction of the Probate Court (MCL 700.1103(j)); **however, Respondent will welcome either this Court's or the Probate Court's guidance as to the best interests of Mrs. Roush and the person who is legally authorized to make medical decisions for Mrs. Roush including a determination that she be discharged from Respondent's facility Against Medical Advice.**
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> [Defendant's Answer to the Writ of Habeas Corpus, attached as EXHIBIT C to Defendant's Application for Leave to Appeal] (emphasis added).

At the hearing on November 16, 2012, Montcalm County Circuit Judge Suzanne Hoseth Kreeger found, among other things, that the Probate Court was the better forum to address the issue due to questions of Ms. Roush's competency, and denied the writ of habeas corpus. [Order Denying Writ of Habeas Corpus, attached as Exhibit D to Defendant's Application for Leave to Appeal].

On that same date, Mr. Gallagher, the original patient advocate, filed a petition for appointment of guardian of alleged incapacitated individual with the Montcalm County Probate

Court. Apparently, on November 21, 2012, Judge Charles W. Simon, III found that no emergency existed to warrant the appointment of a temporary guardian at that time and that Plaintiff should be released from the facility.

Defendant welcomed this guidance from the Montcalm County Probate Court, because Defendant believed (and continues to believe) that only the Probate Court could authoritatively resolve the legitimate disputes about Ms. Roush's competency, whether her Designation of Patient Advocate had been revoked or remained in effect, and, to the extent the Designation remained in effect, as to which person was authorized to make decisions on Ms. Roush's behalf.

Simply put, there is no authority to interpret MCL 700.5510(1)(d) as including a requirement that a facility or medical provider honor a claimed revocation of the designation prior to resolution of invoked statutorily authorized judicial procedures to resolve inherent uncertainties. Both Plaintiff's continued arguments and the Court of Appeals' ruling erroneously read into the statute the insertion of such a requirement contrary to the dictates of the actual statutory language.

SUPPLEMENTAL ARGUMENT II

PLAINTIFF ABANDONED HER CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, ABUSE OF PROCESS, AND CIVIL CONSPIRACY BY NOT ADDRESSING THE DISMISSAL OF THOSE CLAIMS IN HER COURT OF APPEALS' BRIEF; MOREOVER, THE COURT OF APPEALS APPARENTLY RELIED UPON AN UNSWORN-UNNOTORARIZED AFFIDAVIT TO FIND TRIABLE ISSUES OF FACT REGARDING THESE CLAIMS. THUS, THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY REVERSING THE DISMISSAL OF THOSE CLAIMS WITHOUT PERMITTING DEFENDANT TO BRIEF THOSE ISSUES

Defendant-Appellant has no supplement to the Arguments in its Application which correspond to Issues 2 and 3 specified in the Supreme Court's Order of September 18, 2015.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant-Appellant The Laurels of Carson City, LLC respectfully requests that this Honorable Court grant leave to appeal from or peremptorily reverse the Court of Appeals opinion of December 11, 2014 and reinstate the July 10, 2013 Order of the Montcalm County Circuit Court.

Respectfully submitted,

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